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IN THE

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 198_

No.

JESSIE McLEOD and STANLEY HODGE, Petitioners

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21729 as to Petitioner McLeod and Opinion No. 21728 as to Petitioner Hodge, filed June 10, 1982, as reproduced in Petitioners' Appendix A.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the trial court properly refuse to grant the defense a mistrial since it was able to determine, upon inquiry, that there was no actual conflict of interests between defendants McLeod and Hodge?

ARGUMENT

The trial court properly refused to grant the defense a mistrial since it was able to determine, upon inquiry, that there was no actual conflict of interest between defendants McLeod and Hodge.

On this issue Petitioners claim that the trial court did not give them "an opportunity to demonstrate that their right to a fair trial was jeopardized by a potential conflict or whether Petitioners waived their right to counsel." They claim this case should be decided in their favor under this Court's decisions of Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333,

100 S. Ct. 1708 (1980) and Holloway v. Arkansas, 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978). Their arguments are not supported by the Record in this case and they are without merit.

Contrary to Petitioners' argument in their briefs, the trial court did inquire into the possibility of a conflict arising from joint representation of the defendants McLeod and Hodge and the Record shows, in fact, that the trial court raised the issue, sua sponte. The gravamen of the court's and counsels' concern regarding this matter was whether the codefendants would, in fact, give conflicting testimony which would be antagonistic to their defenses. However, when the matter was first raised, the trial court stated that there was no actual conflict apparent but that it would re-entertain counsel's motion for a mistrial at a later time if an actual conflict did appear in the testimony. The motion was

renewed at the conclusion of all evidence, and the trial court made the following ruling:

> BY THE COURT: Mr. Harness, as I perceive the evidence at this point, both of the defendants [Hodge and McLeod] have taken the stand and they have told, for all practical purposes, related the identical set of facts. I, therefore, would respectfully deny your motion. I think Mr. Hodge testified that he didn't buy it [the stolen goods]. The witness Mr. Gregory testified that Mr. Hodge didn't buy it; but Mr. McLeod testified and indicated during his testimony that he did in fact make the purchase [of the stolen goods].

The lower court found, as a matter of fact, that the defenses of these codefendants were not antagonistic or inconsistent so as to create an actual conflict of interest.

The resolution of an attorney's motion to be dismissed from further representation of his client due to conflicts of interest is within the discretion of the trial judge. State v. Jones, 270 S.C. 587, 243 S.E. 2d 461 (1978); State v. Avery, 255 S.C. 570, 180 S.E. 2d 190 (1971). Rule

5 of the rules promulgated under the Defense of Indigents Act further provides that retained counsel shall continue representation until final judgment unless he is relieved by the court upon a showing of good cause. The burden of demonstrating satisfactory cause for removal is upon the Appellant. State v. Hyman, Smith's Advance Sheets, O. No. 21524, July 22, 1981. In this case the court was solicitous of the Petitioners' right to independent counsel and determined after sufficient inquiry on the issue that there would be no actual conflict of interest to justify a mistrial or relieving counsel of his duties.

The case of Cuyler v. Sullivan, supra, is inapposite to the facts of this case since it holds that a defendant who raises no objection at trial to his counsel's conflicts of interest must show that an actual conflict of interest adversely

affected his lawyer's performance. In this case the trial judge moved into an inquiry on the subject of his own accord and found there to be no actual conflict. Likewise, Holloway v. Arkansas, supra, is totally inapposite to the facts of this case since it involved proper pretrial motions based upon a conflict of interest in representing multiple defendants in a criminal case where the conflict was so patently evident on the record that the court held no further inquiry was necessary. Furthermore, the trial court in Holloway failed to make an inquiry at trial as to the nature of any potential conflict. The appeal on this issue is without merit and it should be, accordingly, dismissed.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.